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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 U-HAUL CO. OF NEVADA, INC., *et al.*,

11 Plaintiffs,

12 v.

13 GREGORY J. KAMER, LTD., *et al.*,

14 Defendants.
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Case No. 2:12-CV-00231-KJD-CWH

ORDER

16 Before the Court is Defendant Debra Wilcher's ("Wilcher") Objection to the Order
17 Concerning Defendant, Debra Wilcher's, Emergency Motion to Compel (#230). Plaintiff U-Haul Co.
18 of Nevada, Inc., ("U-Haul") responded (#237) and Wilcher replied (#243). The Order objected to is
19 #215.

20 **I. Background**

21 The parties and the Court are familiar with the procedural and factual background in this
22 case. Therefore, the Court will provide only a brief recitation of the facts and circumstances
23 relevant to the motion at issue. Plaintiffs retained Gregory J. Kamer, LTD. ("Kamer") to represent
24 them in several consolidated National Labor Relations Board ("NLRB") unfair labor practice
25 proceedings. NLRB General Counsel appointed Nathan W. Albright ("Albright") and Steven
26 Wamser to prosecute Plaintiffs. After an affair between NLRB prosecutor Albright and Wilcher

1 came to light, Plaintiffs enlisted the services of other law firms (“Subsequent Law Firms”) to reopen
2 the NLRB Proceedings. Plaintiffs eventually settled the NLRB Proceedings and brought this action
3 against Kamer and Wilcher for malpractice related claims alleging improper use of confidential
4 information in the NLRB Proceedings that resulted in Plaintiffs incurring substantial, unnecessary
5 legal fees.

6 Wilcher contends that Magistrate Judge Hoffman’s Order (#215) is clearly erroneous in
7 failing to waive both attorney-client privilege and the work-product doctrine as to documents held by
8 U-Haul’s Subsequent Law Firms.

9 II. Standard of Review: Clearly Erroneous

10 A District Judge should modify or set aside a Magistrate Judge’s Order if it is clearly
11 erroneous or contrary to law. See Fed. R. Civ. P. 72; LR IB 3-1. To be clear, Defendant’s burden is
12 high. Not only must Defendant persuade the Court that Defendant is indeed correct, but it must also
13 demonstrate that the Magistrate Judge was in clear error.

14 III. Analysis

15 A. Attorney-Client Privilege

16 “In a civil case, state law governs privilege regarding a claim or defense for which state law
17 supplies the rule of decision.” Fed. R. Evid. 501. In Nevada, as a general rule, “[a] client has a
18 privilege to refuse to disclose, and to prevent any other person from disclosing, confidential
19 communications” relating to attorney representation. NRS 49.095. However, “a party waives his
20 privilege if he affirmatively pleads a claim or defense that places at-issue the subject matter of
21 privileged material over which he has control.” Wardleigh v. Second Judicial Dist. Court, 891 P.2d
22 1180, 1186 (Nev. 1995). “Therefore, at-issue waiver occurs when the holder of the privilege pleads a
23 claim or defense in such a way that eventually he or she will be forced to draw upon the
24 privileged communication at trial in order to prevail, and such a waiver does not violate the policies
25 underlying the privilege.” Id. In such cases, at-issue waiver is treated as an “anticipatory waiver”
26 because it anticipates a waiver will occur at trial because “the party asserting the privilege bears the

1 burden of proof on an issue and can meet that burden only by introducing evidence of a privileged
2 nature.” Id. “In other words, where a party seeks an advantage in litigation by revealing part of a
3 privileged communication, the party shall be deemed to have waived the entire attorney-client
4 privilege as it relates to the subject matter of that which was partially disclosed.” Id. At bottom, if a
5 plaintiff raises an issue, and the evidence needed to prove the issue “necessarily comes from
6 privileged documents, fairness requires that the privilege be waived.” Id.

7 Wilcher has failed to demonstrate to the Court that U-Haul intends to introduce privileged
8 evidence from Subsequent Law Firms, leaving unsatisfied the requirements for implied waiver.
9 Further, it is at best unclear how the evaluations of Subsequent Law Firms are necessary or even
10 relevant to the questions of causation and damages which are currently before the Court. However,
11 even if the Court were persuaded to Defendant’s position, the Magistrate Judge was not in clear
12 error.

13 B. Work-Product Doctrine

14 The work product doctrine provides a broader protection than the attorney-client privilege
15 and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a
16 less diligent adversary attorney from taking undue advantage of the former’s efforts. See Hickman
17 v. Taylor, 329 U.S. 495, 511 (1947). It has been held, however, that the work product doctrine
18 protects materials prepared for any litigation or trial so long as they were prepared by or for a party
19 to the subsequent litigation. Federal Trade Comm’n v. Grolier Inc., 462 U.S. 19, 25-26 (1983).
20 “[T]he general policy against invading the privacy of an attorney’s course of preparation is so well
21 recognized and so essential to an orderly working of our system of legal procedure that a burden rests
22 on the one who would invade that privacy to establish adequate reasons to justify production[.]”
23 Hickman, 329 U.S. at 512. However, “[w]here relevant and non-privileged facts remain hidden in an
24 attorney’s file and where production of those facts is essential to the preparation of one’s case,
25 discovery may properly be had. Id.

1 Wilcher argues that denying her access to U-Hauls Subsequent Law Firms' work-product will
2 prejudice Wilcher unfairly. However, Wilcher has not demonstrated that U-Haul intends to use these
3 protected documents in this litigation. Further, Wilcher makes much of the fact that she will be
4 precluded from addressing causation as it relates to the Subsequent Law Firms. However, causation
5 is a prima facie element of U-Haul's case, and the burden of proving causation rests upon it. U-Haul
6 must either prove causation without reference to protected documents, or allow discovery of these
7 documents, but Wilcher cannot compel their discovery without establishing adequate reasons to
8 justify production. Wilcher has not met this burden. Further, the Magistrate Judge was not in clear
9 error.

10 IV. Conclusion

11 **IT IS HEREBY ORDERED** that Defendant Wilcher's Objection to the Order Concerning
12 Defendant, Debra Wilcher's, Emergency Motion to Compel (#230) is **DENIED**.

13 DATED this 19th day of August 2013.

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17 Kent J. Dawson
18 United States District Judge
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